

## SUBCHAPTER F—AREAS UNSUITABLE FOR MINING

### PART 761—AREAS DESIGNATED BY ACT OF CONGRESS

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AUTHORITY: 30 U.S.C. 1201 *et seq.*

SOURCE: 48 FR 41348, Sept. 14, 1983, unless otherwise noted.

#### § 761.1 Scope.

This part establishes the procedures and standards to be followed in determining whether a proposed surface coal mining and reclamation operation can be authorized in light of the prohibitions and limitations in section 522(e) of the Act for those types of operations on certain Federal, public and private lands.

#### § 761.3 Authority.

The State regulatory authority or the Secretary is authorized by section 522(e) of the Act (30 U.S.C. 1272(e)) to prohibit or limit surface coal mining operations on or near certain private, Federal, and other public lands, subject to valid existing rights and except for those operations which existed on August 3, 1977.

#### § 761.5 Definitions.

For the purposes of this part—

*Cemetery* means any area of land where human bodies are interred.

*Community or institutional building* means any structure, other than a public building or an occupied dwelling, which is used primarily for meetings, gatherings or functions of local civic organizations or other community groups; functions as an educational, cultural, historic, religious, scientific, correctional, mental-health or physical health care facility; or is used for public services, including, but not limited to, water supply, power generation or sewage treatment.

*Occupied dwelling* means any building that is currently being used on a regular or temporary basis for human habitation.

*Public building* means any structure that is owned or leased, and principally used by a governmental agency for public business or meetings.

*Public park* means an area or portion of an area dedicated or designated by any Federal, State, or local agency primarily for public recreational use, whether or not such use is limited to certain times or days, including any land leased, reserved, or held open to the public because of that use.

*Public road* means a road (a) which has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) which is maintained with public funds in a manner similar to other public roads of the same classification within the jurisdiction; (c) for which there is substantial (more than incidental) public use; and (d) which meets road construction standards for other public roads of the same classification in the local jurisdiction.

*Publicly-owned park* means a public park that is owned by a Federal, State or local governmental entity.

*Significant forest cover* means an existing plant community consisting predominantly of trees and other woody vegetation. The Secretary of Agriculture shall decide on a case-by-case basis whether the forest cover is significant within those national forests west of the 100th meridian.

*Significant recreational, timber, economic, or other values incompatible with surface coal mining operations* means those values to be evaluated for their significance which could be damaged by, and are not capable of existing together with, surface coal mining operations because of the undesirable effects mining would have on those values, either on the area included in the permit application or on other affected areas. Those values to be evaluated for their importance include:

- (a) Recreation, including hiking, boating, camping, skiing or other related outdoor activities;
- (b) Timber manager and silviculture;
- (c) Agriculture, aquaculture or production of other natural, processed or manufactured products which enter commerce;
- (d) Scenic, historic, archeologic, esthetic, fish, wildlife, plants or cultural interests.

*Surface operations and impacts incident to an underground coal mine* means all activities involved in or related to underground coal mining which are either conducted on the surface of the land, produce changes in the land surface or disturb the surface, air or water resources of the area, including all activities listed in section 701(28) of the Act and the definition of surface coal mining operations appearing in § 700.5 of this chapter.

*Valid existing rights* means a set of circumstances under which a person may, subject to regulatory authority approval, conduct surface coal mining operations on lands where 30 U.S.C. 1272(e) and § 761.11 would otherwise prohibit such operations. Possession of valid existing rights only confers an exception from the prohibitions of § 761.11 and 30 U.S.C. 1272(e). A person seeking to exercise valid existing rights must comply with all other pertinent requirements of the Act and the applicable regulatory program.

(a) *Property rights demonstration.* Except as provided in paragraph (c) of this definition, a person claiming valid existing rights must demonstrate that a legally binding conveyance, lease, deed, contract, or other document vests that person, or a predecessor in interest, with the right to conduct the type of surface coal mining operations

intended. This right must exist at the time that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Applicable State statutory or case law will govern interpretation of documents relied upon to establish property rights, unless Federal law provides otherwise. If no applicable State law exists, custom and generally accepted usage at the time and place that the documents came into existence will govern their interpretation.

(b) Except as provided in paragraph (c) of this definition, a person claiming valid existing rights also must demonstrate compliance with one of the following standards:

(1) *Good faith/all permits standard.* All permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith effort to obtain all necessary permits and authorizations had been made, before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). At a minimum, an application must have been submitted for any permit required under subchapter G of this chapter or its State program counterpart.

(2) *Needed for and adjacent standard.* The land is needed for and immediately adjacent to a surface coal mining operation for which all permits and other authorizations required to conduct surface coal mining operations had been obtained, or a good faith attempt to obtain all permits and authorizations had been made, before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). To meet this standard, a person must demonstrate that prohibiting expansion of the operation onto that land would unfairly impact the viability of the operation as originally planned before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e). Except for operations in existence before August 3, 1977, or for which a good faith effort to obtain all necessary permits had been made before August 3, 1977, this standard does not apply to lands already under the protection of § 761.11 or 30 U.S.C. 1272(e) when the regulatory authority approved the permit for the original operation or when the good faith effort to obtain all necessary permits for the

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original operation was made. In evaluating whether a person meets this standard, the agency making the determination may consider factors such as:

(i) The extent to which coal supply contracts or other legal and business commitments that predate the time that the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) depend upon use of that land for surface coal mining operations.

(ii) The extent to which plans used to obtain financing for the operation before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) rely upon use of that land for surface coal mining operations.

(iii) The extent to which investments in the operation before the land came under the protection of § 761.11 or 30 U.S.C. 1272(e) rely upon use of that land for surface coal mining operations.

(iv) Whether the land lies within the area identified on the life-of-mine map submitted under § 779.24(c) or § 783.24(c) of this chapter before the land came under the protection of § 761.11.

(c) *Roads.* A person who claims valid existing rights to use or construct a road across the surface of lands protected by § 761.11 or 30 U.S.C. 1272(e) must demonstrate that one or more of the following circumstances exist if the road is included within the definition of “surface coal mining operations” in § 700.5 of this chapter:

(1) The road existed when the land upon which it is located came under the protection of § 761.11 or 30 U.S.C. 1272(e), and the person has a legal right to use the road for surface coal mining operations.

(2) A properly recorded right of way or easement for a road in that location existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e), and, under the document creating the right of way or easement, and under subsequent conveyances, the person has a legal right to use or construct a road across the right of way or easement for surface coal mining operations.

(3) A valid permit for use or construction of a road in that location for surface coal mining operations existed when the land came under the protection of § 761.11 or 30 U.S.C. 1272(e).

(4) Valid existing rights exist under paragraphs (a) and (b) of this definition.

*We, us, and our* refer to the Office of Surface Mining Reclamation and Enforcement.

*You and your* refer to a person who claims or seeks to obtain an exception or waiver authorized by § 761.11 or 30 U.S.C. 1272(e).

[48 FR 41348, Sept. 14, 1983, as amended at 52 FR 4261, Feb. 10, 1987; 56 FR 65634, Dec. 17, 1991; 64 FR 70831, Dec. 17, 1999]

EFFECTIVE DATE NOTE: At 51 FR 41960, Nov. 20, 1986 in § 761.5, the definition of *significant recreational, timber, economic, or other values incompatible with surface coal mining operations* was suspended insofar as the listed values are evaluated for compatibility solely in terms of reclaimability.

### § 761.10 Information collection.

(a) In accordance with 44 U.S.C. 3501 *et seq.*, the Office of Management and Budget (OMB) has approved the information collection requirements of this part. The OMB clearance number is 1029-0111. The regulatory authority or other responsible agency will use this information to determine whether a person has valid existing rights or qualifies for one of the other waivers or exemptions from the general prohibition on conducting surface coal mining operations in the areas listed in 30 U.S.C. 1272(e). Persons seeking to conduct surface coal mining operations on these lands must respond to obtain a benefit in accordance with 30 U.S.C. 1272(e).

(b) We estimate that the public reporting and recordkeeping burden for this part will average 15 hours per response under § 761.13, 0.5 hour per response under § 761.14, 2 hours per response under § 761.15, 14 hours per response under § 761.16, 2 hours per response under § 761.17(c), and 2 hours per response under § 761.17(d), including time spent reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The burden for § 761.16 includes 6 hours for the person seeking the determination and 8 hours for the agency processing the request. Send comments regarding this burden estimate or any other aspect of these